INDEX.

AUTHORITIES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

VICTOR L. BERGER ET AL.
v.
THE UNITED STATES OF AMERICA. | No. 460.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on certificate from the Circuit Court of Appeals presenting alone the question as to whether District Judge Landis was in error in presiding on the trial of the case after the filing of an affidavit of prejudice.

The Certificate.

It appears from the certificate that the plaintiffs in error were indicted on February 2, 1918, charged with violating certain sections of the espionage act (40 Stat., c. 30, p. 217). They demurred to the indictment and the demurrer was heard on October 25, 1918, and overruled by Judge Evan A. Evans, one of the circuit judges

for the seventh judicial circuit, who was then sitting in the district court. On November 12, 1918, the plaintiffs in error filed in the district court an affidavit of prejudice, challenging the right of Judge Kenesaw M. Landis, one of the two judges of the district court, to preside in the case. Judge Landis overruled the application for a change of venue and presided at the trial at which the plaintiffs in error were convicted. The affidavit of prejudice was as follows:

> To the honorable judges of the United States District Court of the Northern District of Illinois, Eastern Division:
>
> Your petitioners, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker, and William F. Kruse, jointly and respectively, respectfully represent that they are defendants in the above-entitled cause, wherein they are charged with the crime of conspiracy; that his honor Judge Kenesaw Mountain Landis, judge of the United States district court for said district, is presiding over the trial of criminal cases in said court; that the above-entitled cause was heretofore presided over by Judge Evan Evans, a judge of the United States circuit, before whom a demurrer in the above-entitled cause was presented and argued and before whom a plea of former acquittal was filed by the defendant Adolph Germer; that said demurrer and plea were ruled upon adverse to these defendants on or about October 26, 1918.

Your petitioners further represent that they presumed that the trial of said cause would probably be presided over by said judge who heard said motion, but that they have been informed within the last week that said cause was on the calendar of and to be presided over by said Judge Kenesaw Mountain Landis unless otherwise provided by the court in accordance with section 21 of the Judicial Code of the United States.

Your petitioners further represent that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse, and Adolph Germer, defendants in this cause and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a State or Province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring

to a German who was charged with stating that "Germany had money and plenty of men, and wait and see what she is going to do to the United States," Judge Landis said in substance: "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good

soldier, and as between him and this defendant, I prefer the safe blower."

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, national secretary of the Socialist Party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl—disapproved the entrance of the United States into this war.

Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States, and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries; but verily believe because they are impleaded with Berger, Kruse, and Germer that they as well as Berger, Germer, and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer, and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case.

Wherefore your petitioners pray that proper proceedings be had in accordance with either section 20 or section 23 of said Judicial Code of the United States, so that the senior Circuit Judge of the seventh circuit in which said Northern District of Illinois, Eastern Division, is located shall

assign a district judge to said circuit other than the said Kenesaw Mountain Landis to preside at the trial of the above-entitled cause.

This was signed and sworn to by each of the plaintiffs in error, the oath being "that they are each respectively familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact, except such matters and things as are set forth on information and belief, and as to such matters and things said affiants believe them to be true." Seymour Stedman, attorney for defendants, certifies that "said petition and application for change of venue is made in good faith."

When the application came before Judge Landis there was some discussion, and it appears from the certificate that Mr. Johnson, one of the attorneys appearing for the plaintiffs in error, stated, in answer to an inquiry from the court, that the language imputed by the affidavit to Judge Landis was that used by him in the case of *United States* v. *Weissensel* after a verdict and upon the occasion of the imposition of sentence. The court, after overruling the application, permitted a stenographic report of what occurred in that case to be filed. From this it appears that the affidavit does not at all accurately quote what the judge said. The affidavit quotes him as saying: "One must have a very judicial mind, indeed, not to be

prejudiced against the German-Americans in this country." The stenographic report shows that what he said was: "A man in this country now, in 1918, that has such a judicial mind that he can express affection for this thing called the Kaiser, and his darling people, he is a little bit too judicial minded for his safety in this country." The affidavit quotes him as saying: "You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty." What the stenographic report says he said was: "It is just this type of man that has branded almost the whole German-American population. One German-American like this fellow, going about talking this stuff, does more damage to his people, and by his people I mean born in Germany and after they come here, than thousands of these people can overcome by being good and loyal citizens over here. * * * I say he is an ideal illustration of the occasional American of German birth whose conduct has done so much to damn the whole ten million in America." All this was said after Weissensel had been convicted and when the court was passing on the question of his punishment. The entire stenographic report shows that what the judge said was not directed at the German people in general, but at those Germans who had done what the jury

found the defendant in that case had done. The questions submitted by the court are:

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?

2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

Statute Involved.

The statute involved is section 21 of the Judicial Code, which is as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or

prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. * * *

BRIEF.

The law authorizing the filing of an affidavit of prejudice was enacted for the first time when the Judicial Code was adopted. Just what its effect is has not been determined by this court. One thing would seem, however, to be clear at the outset: Unless the affidavit complies with the requirements of section 21 of the Judicial Code, it can have no effect and the judge against whom it is directed can properly proceed with the trial.

I.

Decisions of this Court.

There are only two cases in which this court has referred to the statute in question, and these cases throw but little light on the present controversy. In the case of *Glasgow* v. *Moyer*, 225 U. S. 420, Glasgow sought, through a habeas corpus proceeding, to be released from the penitentiary upon the ground, among other things, that a dis-

trict judge had presided at the trial at which he was convicted notwithstanding the fact that a proper affidavit of prejudice had been filed. The court, however, held that, if the judge was in error in proceeding with the trial, this was a matter which could be reviewed on writ of error, and hence was not properly triable in a habeas corpus proceeding.

In *Ex parte American Steel Barrel Company*, 230 U. S. 35, 45, an affidavit of prejudice was filed against Judge Chatfield in a bankruptcy proceeding. The judge declined to act further in the case, and Judge Mayer was assigned to take his place. The acts of Judge Mayer were challenged upon the ground that the affidavit of prejudice was not filed in time and was not sufficient in law, and that, therefore, Judge Chatfield should have presided, and the acts of Judge Mayer were void. The court, however, disposed of the question thus:

> We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that "personal bias or prejudice" existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry* v. *Speer*, 201 Fed.

> Rep. 869; *Ex parte Fairbank Co.*, 194 Fed. Rep. 978; *Ex parte Glasgow*, 195 Fed. Rep. 780, affirmed by this court in *Glasgow* v. *Moyer*, 225 U. S. 420. But this is not what happened. Judge Chatfield held that the affidavit was sufficient in law to make it his duty to proceed no further.

These decisions establish that when a judge holds that an affidavit of prejudice is not filed in time, or is insufficient in law, or, for any reason, overrules the application and continues to proceed in the case, his action in so doing is subject to review and, if improper, to reversal by an appellate court, but that unless his acts are so reviewed and reversed they are not void.

Moreover, in *Ex parte American Steel Barrel Company, supra*, the court very clearly indicates what must appear before the judge can be said to be disqualified to proceed. It was said:

> The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse

rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term. (Id., 43–44.)

II.

Decisions of Other Courts.

The question is, What are the rights and duties of a judge when an affidavit of this kind is filed? Plainly, if it is not filed within 10 days before the beginning of the term, and no effort is made to explain why it was not filed earlier, he can disregard it, because the statute, in express terms, requires either that it be filed that long before the term or that the delay be explained. But if it is not filed within the time prescribed, and it is attempted to excuse the delay, is he authorized to determine whether the excuse is sufficient, or must he accept any excuse that is offered? If the affidavit, while charging prejudice or bias, does not attempt to state any facts or any reasons for the belief that such bias or prejudice exists, clearly he may disregard it. But if it does state facts and reasons upon which the belief is based, is he authorized to deter-

mine their sufficiency, or must he treat as sufficient any facts or reasons, however absurd, that may be stated? If the statements of facts made are, on their face, sufficient, must he in all cases accept them as true? If, for instance, a defendant's affidavit states that he had been previously tried before the same judge and punishment out of all proportion to his offense and out of all reason imposed on him, would the judge be bound to accept this statement as true, although the records of his own court showed that in the case referred to the defendant had not been convicted but that the judge had directed a verdict in his favor.

Again, assuming that the allegation that bias or prejudice exists may be made as a matter of belief, is it sufficient to state the supporting facts on information and belief? If the affidavit states merely that it is rumored that the judge has done or said so and so, is the judge bound to treat this as a statement of fact within the meaning of the statute? Or does the statute require that the belief in the existence of bias or prejudice must be supported by the statement of facts to which the defendant can swear of his own knowledge? These are some of the questions that must be considered in interpreting this statute. Undoubtedly the statute was not intended to give the defendant practically a peremptory challenge. Just as undoubtedly the judge is charged with some duty to examine and consider the application before

acting upon it. The question is, what matters is he authorized to consider and determine?

In *Henry* v. *Speer,* 201 Fed. 869, the Circuit Court of Appeals for the Fifth Circuit, after very careful consideration, said, at page 872:

> Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.

Apparently, that court took the view that the judge should determine for himself whether the facts stated were, if true, sufficient in law to justify the belief that prejudice or bias existed, and that if he concluded that the affidavit on its face was sufficient he should not pass upon its truth or falsity. In that case the affidavit had averred a belief that prejudice or bias existed on the part of Judge Speer, and the supporting fact stated, not on information or belief, but as a fact, was that Judge Speer had published an article or statement which indicated "bias and prejudice of the said judge against deponent's right to recover." Judge Speer

held the affidavit insufficient, and in reviewing his action the Court of Appeals said:

> In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word "personal." The deponent in the affidavit filed below failed to use the qualifying word "personal" in making oath to the existence of bias or prejudice on the part of the judge before whom the case was to be tried. It is contended that the use of the word in the statute, in view of the context, is merely cumulative and tautological; that it may be omitted from the affidavit, and still the quality of bias or prejudice will be revealed to be personal. But the statute requires the use of the word, and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons ad-

> vanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and "against deponent's right to recover." Section 21 is not intended to afford relief against this situation.

The court further held that Judge Speer had correctly ruled that the affidavit was insufficient and committed no error in continuing to preside in the case.

It would seem, upon reason and common sense, that the correctness of this decision, as far as it goes, can not be seriously questioned. If the affidavit does not aver personal bias or prejudice or does not state facts which tend in any way to show such personal bias or prejudice, although they may show a prejudgment of the case and a consequent prejudice against the rights sought to be asserted, the statute has not been complied with and the judge may rightfully disregard the affidavit. If this decision is not sound, then all that is required to remove a judge is that a party shall file an affidavit charging personal bias or prejudice and stating as his reason for believing that such bias or prejudice exists any facts he chooses, however unrelated either to himself or the judge. In other words, to give the judge any less discretion in the matter than is given him by the decision quoted above would be, in effect, to give a party to a suit a peremptory challenge.

In the case referred to above the court seems to assume that the trial judge should accept the statements of the affidavit as true. That question, however, was not before the court. The facts averred were statements made in a published article which were not denied. Judge Speer had accepted them as true. And nothing in the case required the court to go further than it did go in holding that, even assuming the statements of facts to be true, the affidavit was insufficient and the action of the judge in disregarding it proper. That case can not, then, be said to have determined that the judge must, in every case and under all circumstances, accept as true every statement made in the affidavit.

In the case of *Ex parte N. K. Fairbank Company*, 194 Fed. 978, Judge Jones, in the District Court for Middle Alabama, refusing to hold himself disqualified, held that the mere filing of an affidavit of prejudice under section 21 does not disqualify a judge where the facts stated of themselves show, as a matter of law, that no prejudice exists. He went further, however, and held that if that section be construed literally to mean that the mere filing of such affidavit is sufficient to disqualify the judge without a hearing to determine whether the facts stated are true or show disqualifications, it would be unconstitutional as depriving the courts of judicial power and vesting the same in the litigants to that extent. In support of this conclusion he delivered an elaborate and learned

opinion, to which the attention of the court is invited. His idea was that the judge must pass on this application as he would on any other matter arising in the course of the case, his action in that regard being subject to review as any other matters, and that the objecting party's rights were sufficiently protected because, if he committed an error, his action could be reversed. He does not question the power of Congress, when a judge is challenged for personal prejudice or bias, to require that he shall proceed no further until the truth of the challenge is investigated and determined by another judge; but he does question the power of Congress to enact that the affidavit of a suitor, whether true or not, shall automatically work a disqualification of the judge. What he says, after a review of the authorities on this question, is worthy of consideration. It is this:

> The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and time again that the possession of such powers is essential to their independence and well-being. In a petition giving facts to show personal bias or prejudice, an unscrupulous litigant, if his passions or those of his attorney permit the one to swear, and the other to certify that he swears in good faith, may will-

fully and falsely charge the presiding judge with high crimes and misdemeanors or other disreputable things without a semblance of truth or decent excuse for doing so. Shackled by this statute, if it be valid, an innocent judge is compelled to enter the slanders upon the records of the court and slink from the discharge of his duty in the particular case as though he were already convicted of crime. If the courts are to last, if they are to perform their functions under the Constitution and exercise the powers committed to them, no such summary way of dealing with, and it may be destroying, a judge can have the force of law. While any conscientious judge would gladly welcome any effort on constitutional lines to remedy the evils at which this statute is aimed, and would feel a sense of relief if the statute were so altered as to conform to the Constitution and thus free him from the embarrassments resulting under the present statute, yet when this is attempted by a statute which outlaws the judge and drives him from the bench in the particular case on the allegations of an affidavit, whether true or false, which condemn him without any defense or hearing of any kind as an unfaithful and incompetent judge, a court which is mindful of its obligation to the Constitution and the sacredness of its oath of office must decline to give the statute any effect and treat it as a nullity. If the judge is suspected, whether rightfully of wrongfully, of bias or prejudice, the ex-

> istence of that bias or prejudice must be ascertained by some judicial authority, and the judge must not be left defenseless against such assaults because a litigant in his court makes an ex parte affidavit. If the matter be referred to some other judge, all the rights of the litigant are preserved and also the dignity and honor of the courts. This is not the case under the present statute. It makes the affidavit maker, in effect, lawmaker, judge, and executioner. The judge may be entirely blameless, but he is not permitted to defend himself or show the falsity of the accusation, and thus is branded for all time on the records of his court as an unworthy judge. (Id., pp. 1000–1001.)

In *Ex parte Glasgow,* 195 Fed. 780, which was affirmed in *Glasgow* v. *Moyer, supra,* it was held that after a conviction the writ of habeas corpus would not lie, upon the ground that the trial judge should have vacated the bench upon the filing of an affidavit of prejudice, for the reason that his action, in that regard, was subject to review on writ of error. Thus, it makes it plain that the mere filing of the petition does not automatically remove the judge, but that he has some judicial function to discharge in passing upon the application. In the *Glasgow* case, the affidavit of prejudice was not filed until after a verdict of guilty and when motions in arrest of judgment and for a new trial were about to be heard. In the petition for habeas corpus it was

insisted that, since the trial judge was required by the statute to proceed no further after the filing of the affidavit, he could not even certify a bill of exceptions after he had wrongfully proceeded with the trial, and hence his action could not be reviewed by writ of error. In that case the district judge had held that the affidavit of prejudice had been filed too late, and hence must be disregarded. Replying to the contention made in the petition for habeas corpus, Judge Newman said:

> The question is, first, whether or not the alleged error of the judge in holding this affidavit ineffectual to stop the case at the stage it had reached, under all the circumstances, could have been taken up for review to the Circuit Court of Appeals for the Third Circuit. Counsel urges that it could not, because, as he states, there was no judge to certify the bill of exceptions or from whose judgment and action the writ of error could have been taken. The position, as I understand it, is that the moment the affidavit was filed the judge became disqualified absolutely and any act of his thereafter, in the case, would have been void. I am unable to agree with counsel about this. There does not seem to me to be the slightest difficulty where the suggestion is made under this section of the new Judicial Code, or otherwise, that a judge is disqualified and he overrules it, and proceeds to try the case or to conclude it if

> he is engaged in trying it, so far as that action can be taken to the proper appellate court for review, the judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed. (Id., p. 782.)

In the case of *In re Equitable Trust Company of New York*, 232 Fed. 836, a petition for the writ of mandamus was filed in the Circuit Court of Appeals for the Ninth Circuit to require a district judge to proceed no further in a case in which an affidavit of prejudice had been filed, and the court held that, since the action of the district judge, in that regard, was subject to review upon writ of error, mandamus would not lie.

It is believed that the foregoing are all the cases in which the Federal courts have undertaken to construe section 21 of the Judicial Code. There is unanimity in holding—

> (1) That upon the filing of an affidavit of prejudice the trial judge must determine whether it is filed in time and whether its statements are sufficient in law to comply with the statute.
>
> (2) That his action in this regard is judicial and is subject to review upon writ of error or appeal, but not subject to collateral attack as being void.
>
> (3) That section 21 of the Judicial Code applies only to those cases in which the affiant can state facts which tend to show personal prejudice or bias.

(4) That the personal prejudice or bias which will disqualify a judge is prejudice or bias personal to the litigants and not merely arising out of a prejudgment of their case.

Only one district judge has considered the question as to whether the judge may, under any circumstances, consider the truth or falsity of the statements made, and that judge held that, if, under all circumstances, the judge must retire if the affidavit is filed in time and contains statements of fact which, if true, tend to show personal prejudice or bias, the act is unconstitutional.

III.

The Judge Presiding When the Affidavit of Prejudice is Presented Must Pass Upon its Sufficiency.

Bias or prejudice is a state of mind. It is something which can be proved and established, not by direct testimony, but by proving declarations, conduct, and facts, which may indicate motives and evidence feeling, and thus throw light on the state of mind. When bias or prejudice is charged, in whatever language the charge is couched, it can, in the very nature of things, be nothing more than the expression of the opinion of the person preferring it, which has been formed by a consideration of the words and conduct of the party against whom the charge is made. Very naturally, therefore, Congress was not willing that a judge should be regarded as disqualified when-

ever any litigant should be willing, under oath, to express the opinion that he was biased or prejudiced. Otherwise, section 21 would simply have provided for an affidavit charging bias and prejudice without more. But it goes further and expressly requires that the affidavit "shall state the facts and the reasons for the belief that such bias or prejudice exists." Congress thus recognized that the charge of prejudice was nothing more than the expression of the belief that it existed. Whether the judge is disqualified depends, then, not upon the mere fact that prejudice has been charged, but upon the facts which it is alleged tend to show such prejudice. Unless the facts so alleged were intended to be considered and decided, by some authority, to have a tendency to prove prejudice, the requirement that they should be stated was an idle ceremony. The object was, of course, to require the statement of facts which would justify the belief in the existence of prejudice.

If, however, these facts are not to be judicially scrutinized for the purpose of determining whether they justify the alleged belief, no possible purpose is served by inserting them in the affidavit. By requiring them to be stated, Congress has evidenced a clear purpose that the mere charge of prejudice shall not be sufficient. It must have had some purpose in requiring the facts upon which the belief of prejudice was based to

be stated. There could have been no purpose in requiring this unless it was intended that the facts stated should be passed on judicially by somebody, so as to test the justification for the belief of prejudice. Congress might, as suggested in the opinion of Judge Jones, *supra*, have provided that, upon the filing of such an affidavit, some other district judge should pass on the sufficiency of the facts stated. It did not do so. It might have required that the petition be certified to the presiding circuit judge of the circuit, and that he should pass on its sufficiency. It did not do this. On the contrary, it provided merely that when the trial judge determined that he should proceed no further, the fact of his disqualification should be certified to the senior circuit judge, whose sole function then was to assign another judge to proceed with the case. But manifestly it was intended that some judge should pass on the sufficiency of the affidavit. Congress has excluded every other judge from the power to do this, and only the judge against whom the affidavit is directed is left to perform that judicial duty. Obviously, then, the only conclusion is that which has been reached by all the courts that have thus far passed on the question, namely, the trial judge must himself pass on the sufficiency of the affidavit before he declines to proceed further with the case. The party filing the affidavit is fully protected by this course. If the trial judge erro-

neously rules that the petition is insufficient, his action is subject to review, and if it is reversed all subsequent proceedings taken by him are wiped out.

IV.

The Facts Stated in the Affidavit in Support of the Belief that Personal Bias or Prejudice Exists Must be Facts Which the Affiant States of His Own Knowledge and Not Merely on Information and Belief.

Assuming that the trial judge must pass upon the sufficiency of the affidavit, the next question is, what shall he consider in arriving at his conclusion? Of course, he must first consider what facts have been averred, and whether they are properly averred. The requirement is that *facts* shall be stated. As seen above, the object in requiring a statement of facts is to get away from basing action upon the mere belief of the affiant. He is required to state *facts* on which he bases his belief. Obviously, it would be insufficient for him to say that he believes prejudice exists because there is a rumor in the community that the judge has done or said such and such thing. This everyone would concede would not be a statement of fact except the bare fact that there is a prevalent rumor, and it is made no more a fact by adding that affiant believes the rumor to be true. A statement that some unnamed person has told him something about the judge's words or conduct would be equally insufficient. Nor would it be made any more suffi-

cient by giving the name of his informant. The only fact which he would then state would be the fact that some third party had made a statement.

It was not contemplated or intended that the act would have very wide application. It could not have been intended that the judge should be disqualified upon a belief on the part of a litigant based upon rumor or mere idle gossip. Since it is only prejudice that is personal to the litigant, and therefore ordinarily grows out of some previous relations, dealings, or contact with the judge, the facts may well be supposed to be within the knowledge of the litigant. This is evidently the view taken of the statute by this court when it said in *Ex parte American Steel Barrel Company, supra:*

> It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. (Id., pp. 43–44.)

Facts " which the affiant is able to state " are, of course, facts which he knows. There is a clear distinction between this and facts which have been reported to him, and the existence of which depend upon the truth or falsity of this secondhand information, and also on whether he may have correctly understood his informant. If any purpose, therefore, is to be served by requiring a

statement of facts, these must be facts which the litigant is able to state as of his own knowledge and not merely as the result of information or rumor communicated to him by others. To say that an affidavit in which the supporting facts are stated merely on information and belief is sufficient would be to do violence both to the language and the intent of Congress.

V.

The Affidavit in This Case is Wholly Insufficient Because the Supporting Facts are Stated Only on Information and Belief.

In this case the only facts and reasons for the belief of prejudice which were presented in the affidavit were certain alleged previous utterances of the judge, which are introduced in the affidavit in this language:

> and in support thereof the defendants allege that, on information and belief, on or about the 1st day of November said Judge Landis said in substance * * *.

This is the form in which a plaintiff in a civil suit may "allege" facts which are not known to him personally, but which he expects to prove when the case comes to trial. Many of the facts upon which a person's civil rights depend are not within his personal knowledge. He has learned of them through others, and he knows witnesses by whose testimony he can prove them. He has the right to make an issue in court in order that he may prove

the facts and have his rights determined. No judgment, however, can be predicated on any fact which he states merely on information and belief unless the fact is admitted by the opposite party or established by competent testimony. We are dealing now, however, with a case in which he is required to state facts, and not merely belief. It is not expected that any issue will be made or witnesses called to prove anything stated in the affidavit. The court is expected to act on the affidavit itself. The act of Congress requires facts—not opinions, beliefs, rumors, or gossip. This court, in the language quoted above, used advisedly the expression facts "which the affiant is able to state." This is not complied with when he merely states that he has heard something; and that is all he states when he alleges a fact on information and belief. No judge is required under this act to hold himself disqualified upon an affidavit which states no fact except on information and belief. The affidavit in this case was, therefore, wholly insufficient for the want of the statement of any facts which the affiant was able to state.

VI.

Even the Facts Stated in the Affidavit on Information and Belief do Not Tend to Show Personal Prejudice.

It should be remembered that the prejudice which disqualifies a judge under this statute is prejudice which is personal to one or the other of the litigants. It is not "prejudice" growing out

of the convictions of the judge with respect to questions involved in the case regardless of who may be the litigants. It is not prejudice based on the judge's intense antipathy and contempt for those who commit the crime with which a defendant may be charged. The judge can not be disqualified upon the ground that he has prejudged the case and given expression to his judgment in previous judicial action, in private conversation, or in public utterances. It must be prejudice which grows out of his knowledge or opinion of the litigant. An affidavit alleging that the judge is an ardent Methodist and entertains an intense prejudice against the Baptist denomination, to which the litigant belongs, would be no ground for disqualification. Equally ineffective would be an affidavit alleging that the judge is a strong Democrat and has previously, in public utterances, indulged in most sweeping denunciation of Republicans, and that the litigant happens to be a Republican. It would hardly be insisted that an affidavit filed by a litigant who is a native-born Irishman that the judge is a native of England and has expressed the strongest prejudice against the Irish people would be sufficient. In all of these cases a prejudice against a large class of people to whom the litigant happens to belong can not be said to be such personal prejudice against the litigant as to disqualify the judge from trying a case to which he is a party.

Certainly, in such cases, unless it is shown that the judge knows the litigant in such a way as that his prejudice against the class extends to the litigant personally, there is no such prejudice as is required by this statute. Again, the fact that a judge believes in severe punishment, and even in a harsh application of the law, to those who commit particular crimes furnishes no reason to believe that he will not fairly try the issue by which it is to be determined whether a defendant is guilty of one of those crimes. It is to be assumed that the very heinousness of the crime will inspire in any intelligent judge the desire that a defendant shall have a fair trial before he shall be convicted.

Undoubtedly, during the active prosecution of the war there was an intense feeling throughout this country against those native-born Germans who, after years of residence in this country, sided with and sought to assist the German Empire as against the United States. That the judges of the country shared this feeling can scarcely be doubted and is to their credit. If this feeling disqualified a judge from trying a case, it would scarcely have been possible to find a United States judge who could preside at the trial of any person of German extraction who was charged with violating the espionage law or other war measure. No intelligent judge, however, would desire that any such person should

be convicted unless guilty. Many judges used very severe language when imposing sentences upon those who had been convicted in such cases. But their condemnation of the crime and of the man who had been convicted of it furnishes no evidence that they had not, in his case, given him a fair trial with the sole desire of ascertaining whether he was guilty, or that they would not be controlled by the same high motives in the trial of similar cases.

In this case it does not appear from the affidavit that the judge knew or had even heard of any one of the defendants. It is not claimed that he had ever expressed any opinion of any of them or of anything they had written, said, or done, or that he had any knowledge of their conduct or knew anything of the case except that they were charged as stated in the indictment. The language which he is quoted as using does not mention or refer to any of them. It quotes him as saying: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." This, if said at all, was said while this country was at war with Germany. It does not refer to German-Americans or native Germans who have become citizens of America; at least there is no express reference to them, and obviously it is an expression applying to the German people and their Government, and the inference to be drawn from the affidavit is that none

of the defendants was a subject of the German Government, but that they were all American citizens, although some were born in Germany and some were of German extraction. This statement, standing alone therefore would not indicate prejudice personal to the defendants within the meaning of the statute. The remaining remarks which the judge was alleged to have made were applied by him to the case of a German who had been convicted in his court. Even as these remarks are quoted in the affidavit the most that can be said of them is that he expressed the belief that German-Americans in this country were not loyal. His condemnation of German-Americans who were not loyal is severe and couched in language somewhat more extravagant than some judges would have used, but expresses, at last, the contempt that all loyal Americans entertained for those American citizens of any nationality who sided with and attempted to assist the enemies of this country.

Throughout all of the remarks as quoted there is nothing said that could apply to any of these defendants, except as some of them may be included in the designation "German-Americans." The remarks do indicate that if these defendants were shown to be guilty of the charges preferred, he would entertain a very great contempt for them and would feel that the law which punished them

severely was right and just. If he had, in fact, expressed the opinion that the German-Americans were disloyal, it indicated, of course, a feeling on his part that the body of this class of citizens was disloyal. No one would infer, however, that he meant that every German-American in this country was disloyal. On the contrary, every intelligent man knew then, and knows now, that many thousands of German-Americans were among the country's most loyal citizens and defenders. His opinion, therefore, of the general class of German-American citizens would, by no means, disqualify him from giving a fair trial to a particular German-American who was being tried in order to determine whether he was in the disloyal class. In other words, no personal contact between the judge and these defendants and no knowledge even of their existence on his part previous to the finding of the indictment having been shown, it can not be said that he had a personal prejudice against any of them merely because they belonged to a general class of people against whom, as a class, but not individually he entertained a prejudice.

It is, therefore, submitted that, taking the affidavit as true, it failed utterly to show any such personal prejudice and bias as the statute requires for the disqualification of a judge.

VII.

Is a Judge Bound Under All Circumstances to Accept as True the Statement of Facts Contained in an Affidavit of Prejudice.

While there is in the record a stenographic report of what Judge Landis said in the remarks which the affidavit purports to quote, this was not filed until after he had overruled the application, apparently upon the ground that it was insufficient. As has been shown above, he was clearly right in this ruling, both because the affidavit stated no facts except on information and belief and because even the facts so stated were wholly insufficient to establish the prejudice alleged. Judge Landis, therefore, did not pass on the question as to whether he was bound to accept as true statements made in the affidavit which he knew were not true. In our view of the case, this court will likewise not find it necessary to pass on that question, and we shall not discuss it at any length. It does seem important, however, to call the court's attention to it, since it seems to be a question of gravity. For this reason, we have referred to the very careful and able opinion of Judge Jones, in which he held that the statute, if construed to automatically remove a judge when the affidavit contains statements which, if true, are sufficient, but which he knows to be untrue, is unconstitutional.

It is a serious thing to say that a judge must practically brand himself in the records of his own court as unworthy and unfit merely because some litigant who, it may be, is utterly unscrupulous has seen fit to file an affidavit falsely charging that he has done and said things which he has not done and said. To say this would put it in the power of every conscienceless litigant to insult and humiliate an honorable and highminded judge at will, and leave that judge powerless to protect himself from the disgrace of a record showing that he is so prejudiced as to be unfit to be a judge. It is easy to conceive of some cases in which it would scarcely be insisted that the judge would have to accept the affidavit as true. For instance, the affiant might charge that on a previous trial the judge had arbitrarily secured his conviction, and that the conviction was so unjust that he had been promptly pardoned by the President, when the record of the judge's own court might show that instead of that being the truth he had, in fact, directed the jury to find a verdict in favor of the affiant, who had therefore not been convicted at all. Certainly, the judge would not be required to shut his eyes to this record of his own court and treat the statements of the affidavit as true.

The present case comes very near to the case supposed. The stenographic report shows clearly that what the judge said was so grossly distorted in the affidavit as to give it an entirely different

meaning. What he said, so far from indicating a prejudice against all Germans, was a denunciation of the occasional disloyal German-American whose conduct unjustly brought reproach upon the entire class to which he belonged. Suppose, again, in a civil case, the affidavit of a defendant should allege that the judge was closely associated in business with the complainant, or was heavily indebted to the plaintiff, who was thereby exerting a dominating influence over him, when the judge knows the fact to be that he has never had any business relations with the plaintiff, owes him no money, and even has no personal acquaintance with him. On such an affidavit can he be required to certify that he is disqualified and rest quietly under this false charge? As stated above, it is not necessary in this case to determine this question. But it has seemed important and proper that it should be mentioned, and a reading of the opinion of Judge Jones, referred to above, will, we think, show that the grounds upon which he held the Act, if so construed, unconstitutional are worthy of the most serious consideration.

VIII.

Answers to the Questions Submitted.

For the reasons stated it is submitted that the answers to the three questions submited should be: To the first question, no; and to the second and third questions, yes.

IX.

Motion of the Plaintiffs in Error to Dismiss or Abate the Prosecution.

The plaintiffs in error have filed a motion to dismiss or abate the prosecution against them. The motion can not be entertained for several reasons:

(1) The case is not here except under the special jurisdiction of this court to answer certain specific questions submitted by the Circuit Court of Appeals, in which the case is now pending. The motion is not based on matters relating in any way to these questions. If there is any ground for dismissing or abating the prosecution, the motion should be presented to the Circuit Court of Appeals and not to this court.

(2) The motion is based upon the mistaken assumption that the espionage law, under which the plaintiffs in error are being prosecuted, is one of the war measures enacted by Congress, which, by their terms, were to expire with the termination of the war with Germany. Starting with this assumption, it is insisted that we are not now at war with Germany and that for this reason the espionage act is no longer in effect. The contention that we are not at war with Germany is based, first, upon the fact that hostilities actually ceased long ago, and, second, that on May 21, 1920, Congress adopted a resolution declaring the war with Germany to be at an end.

It is conceded that this resolution was vetoed by the President, and it has been generally supposed that this prevented its taking effect. The contention is now made that a resolution of this kind does not require the approval of the President, and hence his disapproval did not prevent its taking effect. The theory of the motion is that, either because the war has actually ended or because Congress has by resolution declared it to be ended, the espionage law is no longer in effect, and no saving clause or other legislation having been enacted by Congress, prosecutions begun while the act was in force must now abate.

Even if the case was here in such a way that it would be proper for this court to consider a motion of this kind, it would be necessary to say but little in opposition to the motion. A complete answer is that the espionage act (40 Stat., c. 30, p. 217) is not one of the war measures which, by its own terms, were to expire with the termination of the war which was being waged at the time of its passage. On the contrary, it is enacted as a permanent law of the United States to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States. Section 3, under which plaintiffs in error are indicted, declares that certain things shall be

offenses, not merely while the United States was at war with Germany, but at any time when the United States shall be at war with any country. The other provisions are equally general. None of them are confined to the war which was then being waged. The act contains no clause to the effect that it shall terminate or cease to exist when the war with Germany shall be at an end. It is simply a statute prescribing that certain things shall be offenses when done at any time that the United States may be at war. In other words, it enacts permanent rules which shall govern in times of war. Unless, therefore, the resolution of May 21, 1920, had the effect of repealing this statute, it is still a law of the land and will continue to be, so that if, in any future war, the offenses denounced shall be committed the offenders may be punished. The resolution in question is printed at pages 4–6 of the brief of plaintiffs in error in support of their motion.

It will be seen at a glance that this resolution does not purport to repeal this or any other statute. It simply repeals the resolutions of Congress declaring a state of war to exist between the Imperial German Government and the people of the United States and between the Imperial and Royal Austro-Hungarian Government and the Government and the people of the United States, and declares the war thus begun to be at an end. The only effect it could have on any other previous

legislation would be to determine at what date those measures, which, by their terms, were to be effective only until the termination of the war, ceased to be effective. And there was, in section 2, a general declaration that the date upon which the resolution itself became effective should be deemed the end of the war for purposes of all these measures. As stated above, however, the espionage law was not a measure which was to be effective only during the war but was a permanent statute which should have a governing effect during all periods of war that might occur.

It is therefore wholly unnecessary to discuss the questions which have been so elaborately argued in the brief. There is no contention that the espionage law was not in full force and effect when the offense in question was committed. This contention could not be made because the indictment was found in February, 1918, when the war was flagrant. The law has not been repealed and is still in effect, and it can not be necessary to discuss what would have been the effect upon prosecutions of this kind if the law had been repealed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

DECEMBER, 1920.

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